IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2728 OF 2006

Ezeigwe Sunday John and another Applicants
versus
The Intelligence Officer,
Narcotic Control Bureau
Mumbai and another Respondents

Shri Taraq K. Sayad for applicants.
Shri D.N.Salvi for Narcotic Control Bureau
Smt.M.H.Mhatre, APP for respondent no.1.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 13.09.2006

DATE OF PRONOUNCING THE JUDGEMENT : 09.10.2006

JUDGEMENT :-

1. Heard Shri Sayed for applicants and Shri Salvi for Narcotic Control Bureau, Mumbai ("NCB" for short).

2. This is an application for bail in Narcotic Drugs and Psychotropic Substances Act Special Case No.59 of 2005 (hereinafter referred to as "NDPS case" for short) on the file of Special Judge for NDPS Cases, Mumbai. The applicants

preferred Bail Application No.115 of 2005 and Bail Application No.36 of 2006 in this Special Case and by an order dated 24th April 2006 the learned Special Judge has rejected it. That is how the present bail application in this Court has been filed.

3. The prosecution case briefly is that information was received from Intelligence that two Nigerian Nationals are likely to travel on a flight to Lagos on 28th October 2004. Further, the Intelligence sources informed that these persons are likely to carry a consignment containing Phychotropic Substances in their luggage. The Officers along with Panchas kept surveillance for the suspected passengers at Chhatrapati Shivaji International Airport, Mumbai. They identified two persons who were having three bags. After satisfying themselves about their identity, they were interrogated and the search of their baggages was taken. The said search resulted in recovery of 17,979 ampoules of Fortwin 1 ml. containing 30 mg. Penta-Zocine along with various other medicines like Lomotil and Anti-Snake Venom. They were arrested and during follow up action, the accused no.3 Pradip Dhond, alleged supplier of these materials and

substances under seizure, was also arrested.

4. After investigation the respondents filed complaint against the accused for offences punishable under sections 22(c), 23(c), 28 and 29 r/w 8(c) of NDPS Act. They preferred bail applications as above.

5. The argument canvassed on their behalf is that this Court has enlarged the co-accused Pradip Dhond on bail by observing that the operations in question are not covered by prohibitory measures envisaged by NDPS Act. The injection containing Penta-Zocine allegedly recovered from the applicants, is a scheduled drug under the Drugs and Cosmetics Act. The co-accused has been granted bail by the High Court on such reasoning, and, therefore, they are entitled to be enlarged on bail on identical grounds.

6. The Special Public Prosecutor appearing before the Special Judge pointed out that Pentazocine is a Psychotropic Substance. It is shown at sr.no.27 of the Schedule appended to NDPS Act. The applicants were attempting to export huge quantity of such substance without

licence or permit. There is sufficient evidence against them to prove their involvement in the offence alleged. That apart, the co-accused who has been enlarged on bail, was associated with M/s.Ranbaxy Laboratories Limited which holds a licence for manufacturing the substance in question. Therefore, bail was granted to him. The case stands on a different footing as against these applicants. The quantity involved is more than commercial quantity. Hence, in view of Section 37 of the NDPS Act, they are not entitled to bail.

7. The learned Special Judge relying upon Section 8(c) has held that the substance recovered is included in the Schedule to the Act. It was found in possession of the applicants. The provisions regarding Import, Export and trans-shipment of Narcotic Drugs and Psychotropic Substances are set out in Chapter-VI of NDPS Rules, 1985. Rule 53 deals with general prohibition with regard to export out of India of Narcotic Drugs and Psychotropic Substances specified in Schedule-I. The learned Judge has relied upon rule 53A and Rule 58 and held that these Rules would demonstrate that unless you have special import licence, the prohibition

would apply. The applicants were not possessing such licence. They were also not possessing an Export Authorisation in Form No.5 appended to the Rules as required under Rule 58. There is nothing on record to show that the applicants were lawfully authorised to possess the substances in question. The applicants were attempting to export huge quantity of Phychotropic Substances in question in contravention of the Rules. In this view of the matter and when there is prima facie evidence to show their involvement in the offences punishable under the above mentioned provisions, that bail was denied by the Special Judge.

8. It is correctness of this finding and prima facie conclusion which is subject matter of arguments before me.

9. The learned advocate appearing for the applicants submits that the entire discussion in the order of learned Judge is uncalled for because the substance seized by the Department, is not covered by the Act. He submits that the attention of the learned Judge was invited to a decision of this Court in the case of co-accused in Criminal Application No.6787 of 2005. He

submits that the substance seized is a Schedule-H Drug covered by the Drugs and Cosmetics Act. In such circumstances, the provisions of NDPS Act were inapplicable. My attention is invited to the observations made by me in the judgement referred above. Further, my attention was also invited to the Seizure Panchanama dated 28th October 2004 wherein the seized Articles /substance is nothing but medicines and tablets. My attention is also invited to the fact that the applicants were indeed representing a company based in Nigeria, which has been supplying these drugs for hospital use in Nigeria. The paper book contains Certificate of Incorporation of the said company. One of the applicant is a Director thereof. According to the applicants, one hospital in Nigeria has issued a certificate that drugs have been supplied to the said hospital.

10. Relying upon the aforesaid, Shri Sayed submits that the applicants who are foreigners, are detained in custody since 28th October 2004. Once the above material is appreciated, then, prima facie, no case is made out of commission of any offence under NDPS Act. Therefore, the applicants are entitled to be enlarged on bail.

11. Alternatively and without prejudice, it is contended that the applicants, if enlarged on bail, are ready and agreeable to abide by all conditions including deposit of passport with the learned Special Judge. The applicants would not leave India till conclusion of this case or without prior permission from the Special Judge.

12. Shri Salvi appearing for the prosecution has invited my attention to the affidavit in reply filed on behalf of respondents. He submits that the case of the applicants before me and the co-accused Pradip Dhond is not identical. There is no question of parity. Earlier applicants were licence holders under the Drugs and Cosmetics Act. Shri Dhond was representing such licence holders whereas applicants are not placed in such situation. The transport of Drugs/ Psychotropic Substance is prohibited. In any event, it is not for the purpose covered by exception to Section 8(c) of the NDPS Act. It is not for medicine or for other purpose. The possession is of a large quantity namely 17,976 ampules. Shri Salvi relies upon Rule 66 of NDPS Act and submits that once no licence or authorisation to deal in any medicine which is banned by the law of this country is produced,

then an offence has been committed. The applicants have contravened the provisions of Sections 23 and 24 of NDPS Act by attempting to export the substance out of this country. In such circumstances, the applicants are not entitled to bail.

13. For properly appreciating the rival contentions, a reference would be necessary to Section 8 of NDPS Act. It reads thus :-

> "8. Prohibition of certain operations.-
>
> No person shall -
>
> (a) cultivate any coca plant or gather any portion of coca plant; or
>
> (b) cultivate the opium poppy or any cannabis plant; or
>
> (c) Produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance,
>
> except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:
>
> Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the

> cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:
>
> Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes."

Since reliance is placed on a judgement delivered by this Court by the applicants, it would be necessary to refer to the arguments before this Court. The argument was that the search of applicants before me resulted in recovery of 17,976 ampules of the above substance. It is alleged that these applicants in their statements stated that one person residing in Nigeria gave them address of a shop which belongs to one Pradip Dhond, co-accused herein. It is the case of the applicants that this Pradip Dhond sold these ampules and some amount wad paid in cash.

14. I had considered the application of Pradip Dhond and while enlarging him on bail I followed my earlier ruling in Criminal Application No.3295 of 2005. I had referred to submissions in this criminal application when the application of

Pradip Dhond was argued before me. The basis is that the NDPS Act did not prohibit operations which are carried on by the accused. Prima facie, the operations in questions are not covered by the prohibitory measures envisaged by the Act. Therefore, the Act being inapplicable, then, the embargo contained in Section 37 would not apply. My attention has been invited to this aspect and the contention of the applicants is that the prohibition contained in the Statute, must be seen in the context of individual operations and the Psychotropic Substance in question.

15. However, Shri Salvi sought to distinguish the earlier judgements on the basis that the applicants before me were unable to produce any licence or authorisation to deal in the medicine which is banned by law of the land. The applicants claim to be suppliers of the Psychotropic Substance but they have not produced any licence or authorisation to deal with the Psychotropic Substance. It is in these circumstances that Shri Salvi submits that the applicants' case is not identical or on par with co-accused Pradip Dhond.

16. Shri Salvi places reliance upon Rule 66 of the NDPS Rules which reads thus :-

> "66. Possession, etc. of psychotropic substance.-
>
> (1) No person shall possess any psychotropic substance for any of the purpose covered by the 1945 Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under these Rules.
>
> (2) Notwithstanding anything contained in sub-rule (1), any research institution, or a hospital or dispensary maintained or supported by Government or local body or by charity or voluntary subscription, which is not authorised to possess any psychotropic substance under the 1945 Rules, or any person who is not so authorised under the 1945 Rules, may possess a reasonable quantity of such substance as may be necessary for their genuine scientific requirements or genuine medical requirements, or both for such period as is deemed necessary by the said research institution or, as the case may be, the said hospital or dispensary or person :
>
> Provided that where such psychotropic substance is in possession of an individual for his personal medical use the quantity thereof shall not exceed one hundred dosage units at a time,
>
> (3) The research institution, hospital and dispensary referred to in sub rule (2) shall maintain proper accounts and records in relation to the purchase and consumption of the psychotropic substance in their possession."

17. Section 8 contains prohibition of certain operations. As far as present case is concerned,

the allegation is that the possession as also export from India, is without any authorisation or permit. Even the Trial Court has proceeded on the basis that the applicants were not possessing special import licence as required under Rule 53(A) so also not possessing an export authorisation in Form No.5 appended to the Rules as required under Rule 58. Thus, prima facie, the conclusion is that there is nothing on record to show that applicants were lawfully authorised to possess the substance in question. Further, the applicants were attempting to export large quantity of Psychotropic Substance in question in contravention of the Rules.

18. I need not once again go into the aspects as to what is the nature of prohibition contemplated by Section 8(c) and in what circumstances the exception provided would be applicable. The exception is clear inasmuch as the purpose must be medical or scientific and in the manner and to the extent provided in the Act, Rules or Orders.

19. While it is true that Psychotropic Substance in question is covered by the Schedule to the Act, the Rules under Chapter-VII deal with general prohibition vide Rule 64. Rule 64 states

that no person shall manufacture, possess, transport, import inter-State, export inter-State, sell, purchase, consume or use any of the Psychotropic Substances specified in Schedule-I. Admittedly, in Schedule-I of the rules, the subject Psychotropic Substance is not specified. Therefore, the general prohibition envisaged by Rule 64 is not applicable unless the Psychotropic Substance is specified in Schedule-I to the Rules.

20. Rule 65 specifically covers a situation where any Psychotropic Substance not specified in Schedule-I to the Rules, can be manufactured in accordance with the conditions of licence granted under the Drugs and Cosmetics Rules framed under the Drugs and Cosmetics Act, 1940, by an authority in-charge of the Drugs Control in a State appointed by the State Government in this behalf. Thus, even if Psychotropic Substance is a drug and not specified in Schedule-I to the Rules, its manufacture shall be permitted only in accordance with the terms and conditions of the licence granted under the Drugs and Cosmetics Rules and subject to further provisions of Rule 65.

21. Rule 66 as reproduced above covers a situation where possession of any Psychotropic Substance for any of the purposes covered by the Drugs and Cosmetics Rules, is prohibited unless there is an authority to possess such substance under the Drugs and Cosmetics Rules. The argument, therefore, is that even possession of the subject substance contrary to the mandate of Rule 66 is covered by Section 8(c) and such act is punishable under sections 23 and 24 of the NDPS Act. The punishment being what it is, there is no power to enlarge the applicants on bail unless requirement of Section 37(1)(b)(ii) is satisfied. In the present case, it is not so satisfied. Therefore, even if the co-accused has been enlarged on bail, the present applicants should not be enlarged on bail as they are prima facie guilty of commission of offences under the abovementioned provisions of NDPS Act.

22. Thus, even if the Psychotropic substance is not mentioned in the Schedule to the Rules but the defence available to the co-accused Pradip Dhond, would not be available to the applicant in this case. There is substance in the contentions of Shri Salvi that if Rule 66 is taken into consideration, which applies independently and

covers the specific aspect of possession of drugs/psychotropic substances for any of the purposes covered by Drugs and Cosmetics Rules, then, unless the lawful authorisation to possess subject substance contemplated by the Drugs and Cosmetics Rules is produced, the person in possession would be violating Section 8(c) of the NDPS Act. Such an act attracts penal provisions referred to above. Rule 66(2) covers a case where possession of a reasonable quantity is permitted, provided it is necessary for genuine scientific and medical requirements. However, as far as possession by an individual for medical use is concerned, the quantity thereof shall not exceed 100 dosage units at a time. These aspects are dealt with by the Hon'ble Supreme Court in (i) 2000-SCC-(Cri)-1468 {Hussain Vs. State of Kerala} and (ii) 2004-Cri.L.J.-1757 {Sajan Abraham Vs. State of Kerala}.

23. The Trial Court in this case has adverted to the provisions regarding Import, Export and trans-shipment of Narcotic Drugs and Psychotropic Substances. However, while doing so, the Trial Court has referred to only Rules 53 and 58. It has adverted to the requirement under Rule 58 which provides for export authorisation in

respect of consignment issued by the issuing authority in Form No.5 appended to NDPS Rules. There, the Trial Court, prima facie, observed that Chapter-VII of the Rules would not apply. Rule 53 falls in Chapter-VI of the Rules and it reads thus :-

> "53. General Prohibition.- Subject to the other provisions of this Chapter, the import into and export out of India of the narcotic drugs and psychotropic substances specified in Schedule I is prohibited :
>
> Provided that nothing in this rule shall apply in case the drug substance is imported into or exported out of India subject to an import certificate or export authorisation issued under the provision of this Chapter and for the purpose mentioned in Chapter VII-A."

Therefore, the Trial Court appears to be prima facie right in observing that import into and export out of India of Narcotic Drugs and Psychotropic Substances specified in Schedule-I is prohibited. However, for the general prohibition under Rule 53 to apply, a substance must be covered by Schedule-I to the Rules. That material is not produced. Therefore, I do not wish to enter into any discussion as the subject psychotropic substance is out of purview of Schedule-I of the Rules. In such a case, even

Rule 58 need not be adverted to by me because that will have to be read subject to Rules 53 and 53(A) of the NDPS Act.

24. I find substance in the contention of Shri Salvi with regard to applicability of Rule 66 to the facts and circumstances of present case. There is no material forthcoming from the applicants that they were lawfully authorised to possess the substance in question. Since, the material in that behalf does not appear to have been produced before the Trial Court and sought to be produced for the first time before me, it would not be proper to rely upon the same. These are documents which are appended to the Bail Application. The contents thereof have to be proved by the applicants. This is not the stage to do so. They have liberty in law in that behalf during the course of trial. Presently, from the material produced by the prosecution including Panchanama, it is clear that cartons so also ampoules recovered would prima facie show a violation of the NDPS Act and Rules. This is a punishable offence. Hence, prima facie, it cannot be said that the applicants have not committed any offence punishable under NDPS Act. I have also perused the complaint and the gist of

statements recorded by the respondents. It is in these circumstances that I am in agreement with the conclusion of learned Special Judge that the applicants do not deserve to be enlarged on bail.

25. For the reasons that I have assigned, the applicants' case cannot be said to be on par with the co-accused Pradip Dhond. The co-accused and other applicants were not charged for violation of the above Rules. In fact, I have observed that the co-accused Pradip Dhond was admittedly in the business of distribution of Pharmaceuticals in India. The allegations against him are on different footing. Thus, the earlier judgements are distinguishable. In the result, the application fails and is accordingly dismissed.

26. All observations made by me are for the purpose of disposal of Bail Application and shall not in any manner be held to be conclusive or binding upon the learned Judge while trying the case.

(S.C.DHARMADHIKARI, J.)